APPEAL NO. 93130

This appeal arises under the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. arts. 8308-1.01-11.10 (Vernon Supp. 1993) (1989 Act). On January 19, 1993 a contested case hearing was held in (city), Texas before hearing officer (hearing officer). The issues before the hearing officer were whether or not the claimant has reached maximum medical improvement (MMI); whether or not a designated doctor was selected by mutual agreement of the parties; whether or not the claimant has disability; and whether or not the claimant injured his back in addition to his elbow on (date of injury).
The carrier, which is the appellant in this action, appeals the hearing officer's findings and conclusions that the claimant injured his back in the course and scope of his employment, that he has not reached MMI, and that he has disability. The claimant as respondent essentially contends that the hearing officer's determination should be affirmed.

DECISION

We affirm the decision and order of the hearing officer.

The claimant had worked as a mechanic for a division of (employer) since 1971. On (date of injury), he was working on a scaffold about eight to ten feet off the ground when it broke and he fell backwards onto the floor. He was taken to the emergency room, where he was treated by Dr A for a concussion, face lacerations, and a puncture wound on his leg. The same day, Dr. A transferred him to another hospital for a brain scan, which was negative. On July 8th he was referred to Dr. W, who diagnosed and, over the next few months, treated the claimant for a broken elbow.

The claimant said his back started hurting the night of his accident, but that he was most bothered by cramping and spasms in his leg. He said that Dr. A initially thought the spasms were related to his puncture wound; a November 5, 1991 letter from a Ms. Wright, who was identified as Dr. A' nurse, confirmed this and stated, "Dr. A xrayed (sic) [claimant's] back in the hospital on admission but was considerably more concerned with injury to his head at that time. Now that the puncture wound has healed and the leg spasms continue, Dr. A feels that an evaluation of this patient's back would be beneficial in possibly diagnosing the cause of leg spasms."

The claimant said he told Dr. W about his back about two or three weeks before he was released by Dr. W for his elbow. The medical evidence in the record indicates the claimant was treated until October 15, 1991; Dr. W notes for that date provide in part, ". . . I think he has reached [MMI] in regards to the elbow. He is complaining of some low back pain and I have told him we would evaluate this on a return visit and get x-rays at that time." The claimant said when he tried to arrange for a follow-up visit he was told the carrier would not cover this treatment because it contended claimant's back problems were preexisting.

Dr. W also completed a Report of Medical Evaluation (Form TWCC-69) finding that the claimant reached MMI on October 15, 1991, with a 5% impairment rating. Dr. W also

released claimant to full duty on that date. Under the category, "[d]ocument objective laboratory or clinical finding of impairment," Dr. W wrote, "[f]urther impairment evaluation by AMA guidelines can be done by appt c Dr. P (sic) in Occupational rehab dept."

After Dr. W released him, the claimant said he tried to go back to work. Dr. C, the employer's doctor, examined him and, according to claimant, suggested to the employer that he could not go back to work because of his back problems. Dr. C's notes of November 19, 1991, show that the claimant complained to him of leg spasms and low back pain; the notes also say Dr. C's review of claimant's hospital chart shows no complaint of back pain.

The claimant was next examined by Dr. M, who the carrier contended was a designated doctor agreed to by the parties. Correspondence from a Texas Workers' Compensation Commission disability determination officer was introduced by the carrier as evidence of Dr. M's appointment.

In a narrative report dated February 3, 1992, Dr. M summarized his examination of the claimant and reviewed his history and previous medical reports and tests. With regard to the claimant's complaint of lower back pain, Dr. M said x-rays showed no evidence of pathology with the exception of minimal bone spur formation; no fracture; and no malalignment. He stated in part ". . . he may well have had a low back sprain associated with his fall, pre-existing, or subsequent to the fall. I cannot differentiate that. I can say that I find no evidence of a ruptured disc, pinched nerve, compression fracture, malalignment, or any other pathology on his films or on his examination of his back." Dr. M also told the claimant he could return to work with no restrictions. Dr. Ms narrative did not certify MMI or assign an impairment rating. However, a TWCC-69 signed by Dr. M and dated 12-8-92, found that the claimant had reached MMI on February 3, 1992, with a zero percent whole body impairment rating, and referenced an attached report. The carrier offered Dr. M's TWCC-69 and his narrative report as two separate exhibits. No evidence was adduced to explain the discrepancies in the dates on the two documents, although the carrier's attorney speculated that the date on the TWCC-69 was a typographical error.

After he saw Dr. M, the claimant said he once again attempted to return to work but was told they had nothing for him to do because Dr. C had said he could not do any lifting. On April 6th, apparently at the employer's request, he saw Dr. L, who ordered a myelogram and an MRI on May 4 and May 24, 1992, respectively. A required medical report: spinal surgery recommendations completed by Dr. L summarized the results of these studies as indicating herniation at L5-S1, bulge at L3-4 with spinal stenosis at L3-4 apparently due to bulging disc due to herniation, and bulging disc at L2-3. He took claimant off work and recommended claimant undergo a decompressive lumbar laminectomy.

Thereafter, claimant was sent to Dr. O for a second opinion. On August 28, 1992, Dr. O examined the claimant and reviewed his myelogram and MRI. He found that the

claimant had a large bulging disc at L3-4 and, to a lesser extent, at L2-3, although he said the relationship of his radiographic findings to his symptoms was not entirely clear. He recommended the claimant have a thorough EMG of the low back, right hip, and right lower extremity in an attempt to establish a connection between his back pain and his leg cramping.

The claimant testified that he had been in a car wreck about 5 years prior to his injury, for which he had been off work one week, but he denied any back injury from that accident. He also said he had been treated for a calcium deposit in his elbows about three weeks prior to his injury, for which he was required to submit to a physical exam by Dr. C before he was cleared to return to work.

The claimant stated at the hearing that the last day he worked for employer was (date of injury), the date of his accident. He said his position as lead maintenance mechanic required him to do a lot of heavy lifting; that he has a GED and no training beyond gypsum mill work; and that he does not believe he is now able to work.

The carrier basically challenges the hearing officer's findings of fact and conclusions of law that the claimant injured his back in the fall on (date of injury), but that he did not realize his back had been injured because his initial symptoms, leg cramps, were attributed to his punctured leg; that the designated doctor's February 3, 1992 report did not properly certify MMI or assess an impairment rating and did not sufficiently cover the injury to the claimant's back and that it was not shown that the doctor's earlier report and the later TWCC-69 are companion documents; that the designated doctor's report is contrary to the great weight of the other medical evidence which shows that the claimant has not reached MMI from his back injury; that the only other TWCC-69 in the record, from Dr. W, addressed only the claimant's elbow injury and did not properly document its 5% impairment rating; and that the claimant has been unable to obtain or retain employment because of his injuries (including his back injury) since the date of injury on (date of injury).

Regarding the foregoing, the carrier argues that the preponderance of the evidence is contrary to the hearing officer's findings and conclusions that the claimant injured his back in the course and scope of his employment on (date of injury). With regard to the designated doctor, the carrier contends that the other admissible medical evidence does not constitute a great weight to contradict the designated doctor, and that in fact only Dr. LeGrand's report contradicts the designated doctor's findings. The carrier also contends that the hearing officer's criticisms of the designated doctor's reports are irrelevant, and the fact that the designated doctor was agreed upon by the parties "conclusively binds the parties to the impairment rating and prevents the Commission from considering medical evidence to the contrary."

The carrier additionally contends certain findings of fact are superfluous to the

hearing officer's decision, but it does not appeal them. However, it alleges error in the hearing officer's admission into evidence of claimant's exhibit number one, the letter from Ms. Wright. The carrier, which objected to admission of this letter at the hearing, contends that Ms. W was not a health care provider, that she did not testify in person or by affidavit to authenticate the exhibit, and that the exhibit was reasonably calculated to, and probably did, cause the hearing officer to erroneously find that the claimant's back was injured on (date of injury).

We note at the outset that neither party appealed the hearing officer's finding that Dr. M was a designated doctor agreed to by the parties, despite a paucity of evidence on this point. We also note that we do not necessarily agree with that portion of the hearing officer's reasoning in analyzing Dr. Ms certification of MMI and impairment rating, which finds of significance the facts that the narrative did not certify MMI, the TWCC-69 was prepared subsequent to that, and it was not shown that the two documents were related. The evidence in the record shows the claimant was seen by Dr. M on February 3, 1992; for unknown reasons he apparently failed to complete the TWCC-69 certifying MMI and impairment until December 8, 1992, as the TWCC-69, on its face, contains that date. Standing alone, we believe that these facts may be insufficient to invalidate the designated doctor's report. *See* Texas Workers' Compensation Commission Appeal No. 92469, decided October 15, 1992, which affirmed the hearing officer's adoption of a designated doctor's corrected TWCC-69, and which stated nothing precluded the hearing officer from considering both TWCC-69 forms together with the accompanying report of the designated doctor. *See also* Texas Workers' Compensation Commission Appeal No. 92441, decided October 8, 1992, wherein the Appeals Panel affirmed the hearing officer's determination accepting the amended opinion of the designated doctor. ("Without an order showing otherwise . . . we cannot say that [the designated doctor] was prohibited from amending or changing his report . . .") That opinion pointed out, however, that the designated doctor's revision was prepared within a short time of the initial submission. Under the facts of this case, it appears that Dr. M issued a TWCC-69 adopting by reference his prior report, but did so nine months after the initial report. In that intervening space of time, as the record shows, the claimant had an MRI and a myelogram that disclosed herniated and bulging discs at three locations; one doctor recommended corrective surgery, and another doctor (apparently carrier's second opinion doctor) agreed the bulging discs existed but recommended further testing to determine treatment alternatives. Thus, by the time the designated doctor actually certified MMI, the entire picture of claimant's condition had changed, most notably by tests which two doctors said revealed herniated disks.

While this panel has consistently accorded the opinion of a designated doctor great deference, *see* Texas Workers' Compensation Commission Appeal No. 92412, decided September 28, 1992, describing the "unique position that a designated doctor's report occupies under the Texas Workers' Compensation System," yet we have said that prior decisions of this panel have not indicated the Commission must adopt the whole body

impairment rating of an agreed designated doctor irrespective of how he arrived at it or irrespective of how thorough his report was. Texas Workers' Compensation Commission Appeal No. 93001, decided February 19, 1993. That decision acknowledged that Article 8308-4.26(g) provides that the impairment rating of a designated doctor agreed upon by the parties will be adopted by the Commission; nevertheless, the appeals panel determined in that case that the agreed designated doctor's report was not sufficiently complete because it did not state ratings for various body parts upon which the total impairment was based, and it reversed and remanded to enable the hearing officer to reconsider the designated doctor's report in light of the carrier's assertion that the impairment rating was miscalculated.

Likewise, in this case we are presented with a designated doctor's determination of MMI and impairment, issued subsequent to medical evidence of a back injury which the hearing officer found to have occurred in the course and scope of the claimant's employment. If indeed the hearing officer's determination on the issue of injury is supported by sufficient probative evidence, then the designated doctor's report on MMI and impairment would be premature.

Our examination of the record reveals that there is compelling evidence that the claimant injured his back as a result of his injury on (date of injury). The claimant consistently testified that his back problems first manifested as leg spasms, which his doctor believed to be due to his puncture wound. Dr. W's records show the claimant complaining of low back pain some three months after the injury, conceivably not a length of time as would test credibility due to the number and seriousness of claimant's original injuries. Before claimant could follow through with Dr. W's referral to another doctor, however (which might have obviated any appointment of a designated doctor), he was told the carrier would not pay for any back treatment. He also testified that the employer's doctor, Dr. C, wanted claimant's back checked out before he would approve the claimant's returning to work. The claimant subsequently saw Dr. M, who opined based on x-rays and a physical exam that the claimant had only a back strain; and Dr. L, who ordered an MRI and myelogram which disclosed three bulging discs. Dr. O in acknowledged the disk herniations but recommended further testing before surgery. The claimant testified that he had been off work since the accident, and that he had had no prior back injuries. Based on the foregoing, we cannot say that the hearing officer's determination that the claimant injured his back in the course and scope of his employment was so against the great weight and preponderance of the evidence as to be manifestly unfair and unjust. That being the case, and the fact that the hearing officer's determination is based in part on the existence of an injury for which further treatment may be required, we find that issues of MMI and impairment with regard to the claimant's back injury were not ripe for resolution at the time he was seen by the designated doctor .

To the extent that the hearing officer's finding of injury may have relied upon the November 5, 1991 letter signed by Ms. W, that is not reversible error. While Ms. W's statements undoubtedly constitute hearsay, contested case hearings conducted under the provisions of the 1989 Act are not bound by formal rules of evidence. Article 8308-6.31-6.34. Indeed, Article 8308-6.34(e) provides in part that the hearing officer may accept written statements signed by a witness and shall accept all written reports signed by a health care provider. The letter was clearly admissible and subject to the hearing officer's authority to give it the weight it merited. The admission of such document thus was not error.

Finally, the carrier challenges the hearing officer's determination that the claimant had disability from the date of injury to the present. The claimant testified that he had not worked since that date; that he had attempted to return to work but had not been able to do so until he received further medical releases; and that Dr. L took him off work entirely in April of 1992. Under these circumstances, we find the hearing officer was correct in holding that the claimant was unable to obtain and retain employment at wages equivalent to the preinjury wage because of his compensable medical injury. *See* Article 8308-1.03(16).

The decision and order of the hearing officer are affirmed.

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Lynda H. Nesenholtz
Appeals Judge

CONCUR:

_____
Stark O. Sanders, Jr.
Chief Appeals Judge

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Joe Sebesta
Appeals Judge